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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-831

WARDEN, LEWISBURG PENITENTIARY, PETITIONER

v.

BENIGNO MARRERO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 483 F. 2d 656. The memorandum and order of the district court (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 27, 1973. On October 25, 1973, Mr. Justice Brennan granted a stay of mandate pending the timely filing of a petition for a writ of certiorari, and continuing thereafter until this Court determines the matter (App. 14). The petition for a writ of certiorari was filed on November 26, 1973 and

was granted on January 7, 1974 (App. 15). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision in 26 U.S.C. (1964 ed., Supp. V) 7237(d) that certain narcotics offenders are not eligible for parole under 18 U.S.C. 4202 survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, so that a narcotics offender who committed his offenses before the effective date of the new statute may not be considered for parole even though he has served more than one-third of his sentence.

STATUTES INVOLVED

Section 103 of the Narcotic Control Act of 1956, 70 Stat. 568, as amended, 26 U.S.C. (1964 ed. and Supp. V) 7237, provided in pertinent part:

Violation of laws relating to narcotic drugs and to marihuana

(a) *Where no specific penalty is otherwise provided.*

Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 [26 U.S.C. (1964 ed.) 4701–4762] for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be im-

prisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

* * * * *

(d) *No suspension of sentence; no probation; etc.*

Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended [21 U.S.C. (1964 ed.) 174, 176a, 176b], or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted to narcotic drugs section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24–201 and following), as amended, shall not apply.

Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1294, provides in pertinent part:

> Prosecutions for any violation of law occuring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

and in the case of a violation of a law relating

Section 109 of the Act of July 30, 1947, 61 Stat. 635, 1 U.S.C. 109, provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Prisoners eligible.

18 U.S.C. 4202, provides as follows:

> *Prisoners eligible*
>
> A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, respondent was convicted on a two count indictment of having received, facilitated the transportation of, and concealed heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174 (count 1) and of having purchased, dispensed and distributed cocaine not in or from its original stamped package, in violation of 26 U.S.C.

(1964 ed.) 4701, 4703, 4704(a), 4771(b) and 7237(a) (count 2). On May 27, 1970 (before the May 1, 1971, effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970), he was sentenced as a second offender to concurrent terms of ten years' imprisonment on each count. The court of appeals affirmed (450 F. 2d 373 (C.A. 2)), and this Court denied certiorari, 405 U.S. 933. Respondent is now serving that sentence in the federal penitentiary at Lewisburg, Pennsylvania.

On February 24, 1972, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania (App. 6–7). He claimed that since the statute in effect at the time of his sentencing (26 U.S.C. (1964 ed., Supp. V) 7237(d))—under which he was ineligible for parole under 18 U.S.C. 4202—was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, he should be eligible for parole under 18 U.S.C. 4202 in September 1973, when one-third of his sentence had been served.[1]

The district court held that the 1970 statute did not repeal the prohibition on parole eligibility in the prior statute, on the ground that such prohibition was a penalty preserved by the specific savings provisions of Section 1103(a) of the 1970 statute and by 1 U.S.C. 109 (Pet. App. C). The Court of Appeals for the

[1] Respondent actually became eligible for parole on June 20, 1973, if 18 U.S.C. 4202 is applicable to him. Neither court below considered whether habeas corpus relief was appropriate before that date, a question that now appears to be moot.

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Third Circuit reversed, holding that the 1970 statute had repealed the prohibition on parole eligibility in the prior act (Pet. App. A). It granted the writ and directed that respondent be released unless he were considered for parole within 60 days. The court's mandate has been stayed pending this Court's determination.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bradley* v. *United States,* 410 U.S. 605, this Court held that the prohibition of suspended sentences, probation, and early parole under 18 U.S.C. 4208(a)[2] imposed on certain narcotics offenders convicted under the Narcotic Control Act of 1956 survived the repeal of that Act by the Comprehensive Drug Abuse Prevention and Control Act of 1970. However, since the petitioners in *Bradley* had only begun service of their sentences, and were thus in any event not eligible for parole under 18 U.S.C. 4202, the Court did not reach the question whether the ban on Section 4202 parole also survived the enactment

[2] 18 U.S.C. 4208(a) permits the judge at sentencing to specify a minimum term after which the defendant shall become eligible for parole. If no such designation is made, the general parole statute, 18 U.S.C. 4202, provides that a federal prisoner is eligible for parole after he has served one-third of his sentence. Under both statutes, the Parole Board must, when the prisoner becomes eligible, determine whether or not to place him on parole.

of the 1970 statute. Marrero has served one third of his sentence; therefore, the question of parole eligibility under 18 U.S.C. 4202, left open by the *Bradley* majority, is squarely presented here.

Two members of the Court did reach that question in *Bradley* and decided that parole was unavailable under Section 4202. Mr. Justice Brennan and Mr. Justice White in a separate statement at 401 U.S. 611-612, declared:

> that § 1103(a) forecloses the availability of parole under both 18 U.S.C. § 4202 and 18 U.S.C. § 4208(a), and that even if this were debatable as to § 4202, that the general saving statute, 1 U.S.C. § 109 clearly mandates that conclusion as to that section. * * *

We submit that this view is correct. The Narcotic Control Act of 1956 imposed ineligibility for parole under 18 U.S.C. 4202 as a penalty for conviction of certain narcotics offenses. When the 1956 Act was repealed, this penalty was saved by 1 U.S.C. 109, as well as by the necessary implication of the legislative history of the repealing act, the Comprehensive Drug Abuse Prevention and Control Act of 1970. Moreover, this Court's analysis of the specific savings clause in the 1970 Act, Section 1103(a), 84 Stat. 1294, supports the conclusion that the ineligibility for parole under 18 U.S.C. 4202 is part of the sentence, and thus of the prosecution saved by Section 1103(a).

ARGUMENT

AN OFFENDER WHO VIOLATED THE FEDERAL NARCOTICS LAWS PRIOR TO THE EFFECTIVE DATE OF THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970 IS INELIGIBLE FOR PAROLE UNDER 18 U.S.C. 4202

A. CONGRESS DID NOT INTEND THAT THOSE WHO HAD VIOLATED THE 1956 ACT WOULD BECOME ELIGIBLE FOR PAROLE UNDER 18 U.S.C. 4202 WHEN THE 1970 ACT BECAME EFFECTIVE

The determination of the penalties for criminal offenses is essentially a matter of legislative policy, subject only to constitutional limitations. If the legislative judgment is sufficiently clear, it is conclusive, even if a different policy might seem wiser or more enlightened. *Gore* v. *United States,* 357 U.S. 386, 393; *Bell* v. *United States,* 349 U.S. 81, 82–83; cf. *Powell* v. *Texas,* 392 U.S. 514.

Neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U.S.C. 4202. Such a requirement would not demand the granting of parole to any individual prisoner unless the Board determines that his supervised release from confinement is in the interests of both the prisoner and society. But these agencies are obliged to execute the will of Congress, and it appears to them that Congress did not intend that such offenders would be eligible for parole.

1. The no parole provision was a penalty imposed by the Narcotic Control Act of 1956

Congress stated in the 1970 Comprehensive Drug Abuse Prevention and Control Act that "[p]rosecutions" for violations occurring prior to May 1, 1971 were not to be affected (§ 1103(a), 84 Stat. 1294). Since there was no express provision to the contrary, the 1970 Act must also be construed as including the provisions of the general saving statute, *United States* v. *Reisinger,* 128 U.S. 398, 402–403; *United States* v. *Carter,* 171 F. 2d 530, 532 (C.A. 5).[3] That statute provides that the repeal of a statute does not "release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide * * *" (1 U.S.C. 109).

Therefore, the controlling inquiry in this case is whether Congress considered ineligibility for parole under 18 U.S.C. 4202 part of the "prosecution" for violation of the 1956 Act, or of the "penalty, forfeiture, or liability" incurred under that Act. If so, then respondent remains ineligible for parole.

We submit that Congress did intend that the ban on parole under 18 U.S.C. 4202 should survive the

[3] This is true even when the repealing act contains its own specific saving provision, so long as the repealing act does not provide otherwise. See *Duffel* v. *United States,* 221 F. 2d 523, 524 (C.A. D.C.); *United States* v. *Kirby,* 176 F. 2d 101, 104 (C.A. 2); *Lovely* v. *United States,* 175 F. 2d 312, 316 (C.A. 4). The 1970 Act does not attempt to bar the application of the general saving statute.

repeal of the 1956 Act, and that the same result follows under either Section 1103(a) or 1 U.S.C. 109.[4] But, as Justices White and Brennan noted in *Bradley*, even if that result were debatable under Section 1103 (a), it is mandated by 1 U.S.C. 109 (410 U.S. at 612).

Indeed, the statute on its face shows that Congress intended in 26 U.S.C. (1964 ed., Supp. V) 7237(d)—which, *inter alia*, proscribed parole under 18 U.S.C. 4202—to describe the penalties for violation of the 1956 Act. Section 7237 is entitled "violation of laws relating to narcotic drugs and to marihuana"; its various sections define the penalties to be imposed, one of which, by virtue of 7237(d), is ineligibility for parole. Congress thus unequivocally manifested its determination that one of the penalties to be imposed on certain narcotics offenders was to render them ineligible for parole after conviction.

The legislative history of the Narcotic Control Act of 1956 also shows that denial of parole was part of the method Congress chose to punish the narcotics trafficker severely. After extensive hearings, the Sub-

[4] The question whether Section 1103(a) applies is significant, at least theoretically, in one context. If the inapplicability of Section 4202 is part of the prosecution saved by Section 1103(a), it is part of the sentence (see *Bradley*, *supra*, 410 U.S. at 609). It then follows that the district court was without jurisdiction to entertain respondent's habeas corpus petition since his exclusive remedy was to seek relief from the sentencing court, 28 U.S.C. 2255. We have not argued the jurisdictional issue separately, since it is entirely controlled by the conclusion concerning the scope of Section 1103(a): If that section covers ineligibility for parole under 18 U.S.C. 4202, the issue is for the sentencing court under 28 U.S.C. 2255, and the district court here had no jurisdiction (see Pet. App. C 16a–18a).

committee on Narcotics of the House Committee on Ways and Means concluded:

> Effective control of the vicious narcotic traffic requires not only vigorous enforcement but also certainty of punishment. Conclusive evidence was presented during your subcommittee's investigation that the imposition of heavier penalties was the strongest deterrent to narcotic addiction and narcotic traffic. In those areas of the country where we found leniency in sentencing the prevailing practice, drug addiction and narcotic traffic without exception are on the increase. Also without exception, wherever heavier penalties are imposed by the courts, narcotic traffic and addiction are at a virtual minimum or nonexistent.
>
> * * * * *
>
> However, it must be recognized that special incentives in our penal systems serve to decrease the actual time spent in a penal institution under a sentence imposed by the court. The violator is eligible for parole after serving one-third of his sentence. As is true of all Federal violators, he is subject to conditional release after serving two-thirds of his sentence. Available data from the Bureau of Prisons indicate that a narcotic violator actually serves an average of less than two-thirds of the sentence imposed by the court. This tends to defeat the purposes of the act and should be corrected as set forth in the subcommittee recommendations. [H. Rep. No. 2388, to accompany H.R. 11619, 84th Cong., 2d Sess., pp. 63–64.]

Thus Section 7237(d) represented a clear and positive decision by Congress to make the absolute pro-

hibition against parole an inherent element of the penalty imposed on the narcotic trafficker.[5] Ineligibility for parole is thus a penalty provided for violation of the 1956 Act. Under 1 U.S.C. 109, it survived the enactment of the contrary provisions of the 1970 law.

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[5] The fact that denial of parole is a part of the penalty is further shown by its effect upon the convicted defendant. Any prisoner who is released on parole undoubtedly considers that he has been subjected to a less severe penalty than if he were incarcerated for the full term of his sentence. See *United States* v. *Ross*, 464 F. 2d 376, 379 (C.A. 2). The converse is equally true: the statutory denial of the possibility of parole must naturally be regarded as increasing the penalty for the crime. The Sixth Circuit stated the correct view in *Harris* v. *United States*, 426 F. 2d 99, 100:

"It may be 'legislative grace' for Congress to provide for parole but when it expressly removes all hope of parole * * * this is in the nature of an additional penalty. * * *"

Other courts have recognized this fact in holding that a guilty plea taken without informing the defendant of his ineligibility for parole is invalid, since it is made without understanding the consequences of the plea. As the court in *Berry* v. *United States*, 412 F. 2d 189 (C.A. 3), noted, Rule 11, Fed. R. Crim. P., requires that the pleader be aware of the outer limits of punishment, and the loss of parole eligibility is "an inseparable ingredient of the punishment imposed. Its effect is so powerful that it translates the term imposed by the sentencing judge into a mandate of actual imprisonment for a period of time three times as long as that ordinarily expected." *Id.* at 192. Accord, *Munich* v. *United States*, 337 F. 2d 356, 361 (C.A. 9); *Jenkins* v. *United States*, 420 F. 2d 433, 437 (C.A. 10); *Harris* v. *United States*, 426 F. 2d 99 (C.A. 6); *Bye* v. *United States*, 435 F. 2d 177 (C.A. 2). Contra, *Trujillo* v. *United States*, 377 F. 2d 266 (C.A. 5), certiorari denied, 389 U.S. 899, and *Smith* v. *United States*, 324 F. 2d 436 (C.A.D.C.), certiorari denied, 376 U.S. 957.

2. The 1970 Comprehensive Drug Abuse Prevention and Control Act was not intended to benefit those convicted under the 1956 Act

This conclusion might be doubtful if the 1970 Comprehensive Drug Abuse Prevention and Control Act reflected a subsequent congressional conclusion that the no-parole element of the penalty was too harsh, and should be eliminated in all cases. The 1970 Act did add a rehabilitative goal to the basically punitive approach of the 1956 Act. It provided a more flexible approach emphasizing rehabilitation for certain offenders—primarily for "individual abusers." The legislative history shows, however, that the purpose of the new sentencing flexibility was not to benefit incarcerated narcotics traffickers, but to increase the likelihood that those who engaged in such traffic would be prosecuted and convicted. In explaining the bill's approach to penalties, the House Report stated:

> The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> The severity of existing penalties, * * * have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat

> more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.[6]

It would be inconsistent with this approach to infer a congressional intent to permit those already convicted of violations of the 1956 Act to benefit from the more lenient provisions of the 1970 Act. Nothing in the legislative history supports such an inference. The purpose of the more lenient sentencing provisions of the 1970 Act was not to benefit those previously convicted under the prior statute, but to facilitate convictions under the new one.

Indeed, to read the 1970 Act as repealing the ban on parole eligibility under 18 U.S.C. 4202 would create a serious dilemma, since the 1970 Act still prohibits parole for those whose narcotics violations are part of a continuing criminal enterprise (21 U.S.C. 848). Therefore, unless those convicted under the 1956 Act remain ineligible for parole, the Parole Board will either have to consider all those so convicted eligible under 18 U.S.C. 4202, or attempt to determine which offenders remain ineligible under the provisions of the new law. Both alternatives are unacceptable.

If the first approach were adopted, those guilty of criminal activities for which Congress has denied parole under both the old and new laws would be con-

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[6] H. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess.) p. 11.

sidered eligible for parole, and perhaps released, in direct disregard of the consistent congressional directive.

The alternative is scarcely preferable. Since there was no substantive offense under the 1956 Act comparable to the one now defined in 21 U.S.C. 848, the Parole Board would have to attempt to determine whether the offender would have been convicted under 21 U.S.C. 848 if it had been in effect at the time of his offense. At best this requires a judgment on a highly speculative matter for which the Board is not particularly equipped, and imposes a substantial administrative burden on the Board.[7] At worst, it could constitute an infringement on the proper function of the jury, since the Board would have to determine whether the evidence was such that a jury would have found the offender guilty of a crime other than that for which he was actually convicted.

There is no indication in the 1970 Act or its legislative history that Congress intended to create such a dilemma. Instead, the only conclusion that can realistically be drawn is that Congress recognized that the ineligibility for parole under the 1956 Act was part of the penalty under that Act which was saved under 1 U.S.C. 109. It therefore assumed that there was to be no change in parole eligibility for those convicted of violating the 1956 Act.

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[7] The instant case provides a good example, Marrero was a second offender; this fact raises the possibility that he was part of a continuing criminal enterprise. But since he was convicted under the 1956 Act, the record does not show whether his offenses were of the type condemned by 21 U.S.C. 848.

3. The general savings statute applies in this situation

The same result follows from the language of 1 U.S.C. 109 itself. That statute, originally enacted in 1871, provides:

> [T]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *. [Act of February 25, 1871, Section 4, 16 Stat. 432.]

At common law, when a criminal statute was replaced by another statute or was amended to lessen the punishment, the defendant was entitled to the benefit of the new Act, although his offense was committed prior to the effective date thereof, unless there was a general saving statute or a specific clause in the new act. Beginning with *United States* v. *Reisinger,* 128 U.S. 398, the general saving clause (now 1 U.S.C. 109) has been held to apply to criminal laws and the punishments attached to them, and the effect has been to preserve the vitality of an amended or repealed law for purposes of both prosecuting and punishing offenses committed while the law was in effect. See *Lovely* v. *United States,* 175 F. 2d 312 (C.A. 4); *Hurwitz* v. *United States,* 53 F. 2d 552 (C.A. D.C.); *Duffel* v. *United States,* 221 F. 2d 523 (C.A. D.C.); *United States* v. *Kirby,* 176 F. 2d 101 (C.A. 2); *United States* v. *Brown,* 429 F. 2d 566 (C.A. 5); *Faubion* v. *United States,* 424 F. 2d 437 (C.A. 10); *Maceo* v. *United States,* 46 F. 2d 788 (C.A. 5);

United States v. *Smith*, 433 F. 2d 341 (C.A. 4); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5); *United States* v. *Taylor*, 123 F. Supp. 920 (S.D. N.Y.), affirmed on opinion below, 227 F. 2d 958 (C.A. 2).

As we have shown, the ineligibility for parole was part of the penalty imposed under the 1956 Act. Since 1 U.S.C. 109 provides that the repeal of an Act does not have the effect of extinguishing any penalty incurred thereunder, it follows that the repeal of the 1956 Act does not extinguish respondent's ineligibility for parole.

The court below avoided the effect of 1 U.S.C. 109 by concluding that it was "intended to obviate the common law's technical abatement of a prosecution by the repeal of the statute under which it proceeded. *Hamm* v. *Rock Hill*, 379 U.S. 306, 314 (1964)" (Pet. App. A 12a). It therefore concluded that the purpose of that section would not be furthered by applying it to preclude parole eligibility under Section 4202.*

In our view, however, *Hamm* v. *Rock Hill* supports the opposite conclusion. There this Court cited, as an example of a situation in which the general saving statute would apply to prevent a technical abatement, the case of a new statute substituting more severe penalties for those originally applicable (379 U.S. at 314). It distinguished such a situation from the one before it, in which the defendant had been convicted

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*This analysis is inconsistent with the statement of Justices Brennan and White in *Bradley;* it also finds no support in the majority opinion, which at least implies the applicability of 1 U.S.C. 109. 410 U.S. at 611, n. 6.

under state trespass statutes for peacefully sitting-in at public lunch counters. That conduct had become affirmatively protected by statute and thus transformed into a right.*

Although, in the present case, the new statute ameliorated the penalties previously applicable rather than increasing them, Section 109 nonetheless applies to prevent abatement, since no new right has been created or recognized. Indeed, this Court has applied Section 109 to avoid abatement even when the conduct involved was no longer a crime under the new law. See *Pipefitters* v. *United States,* 407 U.S. 385; *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 553–554; *Hertz* v. *Woodman,* 218 U.S. 205; *United States* v. *Reisinger, supra.*

The offense of selling cocaine has undergone no such transmutation from prohibited crime to protected right as had the conduct in *Hamm.* Indeed, unlike the conduct in *Pipefitters, Allen, Hertz,* and *Reisinger,* respondent's conduct remained criminal under both the old and new acts; the new act simply altered the specific elements of certain offenses and changed the penalties. Both the legislative history concerning the purposes of the legislation and the inclusion of a specific saving clause reflect congressional

* In *Pipefitters* v. *United States,* 407 U.S. 385, this Court similarly interpreted *Hamm* as applying only where a right is substituted for a crime. Although subsequent legislation there made lawful what had been a crime, the Court held that the general saving statute left the pre-trial conduct fully punishable. Significantly, the Court reached that conclusion even after finding that there was no demonstration of specific congressional intent on this point when the new act was passed.

intent to let the pre-repeal law control pre-repeal violations. We submit, therefore, that 1 U.S.C. 109 applies in this situation.

B. THIS COURT'S DECISION IN BRADLEY SUPPORTS THE CONCLUSION THAT PAROLE UNDER SECTION 4202 IS UNAVAILABLE TO NARCOTICS OFFENDERS SENTENCED UNDER THE 1956 ACT

We turn now to the applicability of Section 1103 (a) of the 1970 Drug Abuse Prevention and Control Act, which preserves "prosecutions" under the 1956 Act. Section 1103(a) was analyzed in *Bradley;* that analysis, we submit, indicates that eligibility for parole under 18 U.S.C. 4202 is as much a part of the "prosecution" as eligibility for parole under 18 U.S.C. 4208(a).

Bradley held that the determination of parole eligibility under 18 U.S.C. 4208(a) is part of the sentencing process, and thus of the "prosecution" saved by Section 1103(a) of the 1970 Act. This is so because, under 18 U.S.C. 4208(a), the decision when an offender will become eligible for parole is made by the judge at the time of sentencing (410 U.S. at 610–611). Viewed pragmatically, the decision when an offender will become eligible for parole under 18 U.S.C. 4202 is also made by the judge at the time of sentencing. To be sure, under Section 4208(a) the decision is made explicitly as part of the sentence, while under Section 4202 the decision is made implicitly by fixing the length of the sentence. Nevertheless, since judges are well aware of the limitations of Section 4202, an offender's eligibility for parole upon the expiration

of one-third of his sentence is undoubtedly a factor which is ordinarily considered in imposing sentence.[10]

The time when the offender becomes eligible for parole, whether under Section 4208(a) or under Section 4202, is thus a decision made by the trial judge at sentencing. Under the teaching of *Bradley*, this is part of the prosecution saved by Section 1103(a).[11]

The court below found support for its conclusion that the "§ 4202 parole eligibility decision" is not part of the prosecution saved by Section 1103(a) in this Court's statement in *Bradley* that the decision to grant parole under Section 4202 occurs "long after sentence has been entered and the prosecution terminated" (Pet. App. A 11a; 410 U.S. at 611, n. 6).[12] In

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[10] Marrero could have been sentenced to as much as forty years imprisonment under count 1 (21 U.S.C. (1964 ed.) 174) and twenty years' imprisonment under count 2 (26 U.S.C. (1964 ed.) 7237(a)). Although it is not possible to determine what sentence the trial judge would have imposed had he believed that Marrero would be eligible for parole under Section 4202, it is at least clear that the judge in imposing sentence did not contemplate Marrero's release after little more than three years.

[11] The court in *United States* v. *Marshall*, 485 F. 2d 1062 (C.A. D.C.), reached the question at issue here when remanding for resentencing precisely because the defendant's parole eligibility *vel non* under 18 U.S.C. 4202 was relevant to the judge's decision on the length of the sentence to be imposed, *id* at 1065.

[12] We do not believe that the Court in *Bradley*, which "express[ed] no opinion" on the "rather different matter" of Section 4202 parole (410 U.S. at 611), nevertheless intended, in the remark quoted above, to imply that such parole was not part of the prosecution saved by Section 1103(a). Instead, we think the quoted remark was intended simply to show why there was no need to consider the Section 4202 issue in rejecting peti-

this respect, however, parole under Section 4202 is no different from parole under Section 4208(a), which *Bradley* held to be part of sentencing. Under both sections, the Parole Board decides whether to grant parole when the designated minimum period of incarceration has been served, some time after sentencing. But *Bradley* indicates that this is not significant. Since the decision concerning the time at which an offender will become eligible for parole is made by the trial judge at sentencing under both sections, parole *eligibility* under both sections is part of the sentence, and thus of the prosecution.[13]

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tioners' contention that they were entitled to be sentenced under the 1970 Act. The question of the ripeness of the Section 4202 issue and the distinction, if any, between that issue and the Section 4208(a) issue was not raised in the lower court proceedings in *Bradley*, nor was it briefed or argued to this Court.

[13] *Morrissey* v. *Brewer*, 408 U.S. 471, which indicates that the decision by administrative authorities to grant or deny parole is not part of the "prosecution" for purposes of the Sixth Amendment, is entirely consistent with this conclusion. Our argument is that the decision concerning the time of eligibility for parole, not the actual grant or denial of parole, is part of the prosecution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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